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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Butte)**

THE PEOPLE,	C059253
Plaintiff and Respondent,	(Super. Ct. No. CM026150)
v.	
DARRIN LEE PACHECO,	
Defendant and Appellant.	

A jury convicted defendant Darrin Lee Pacheco of voluntary manslaughter (Pen. Code, § 192, subd. (a)),¹ with a special finding that he used a deadly weapon in the commission of the offense (§ 12022, subd. (b)(1)). After sustaining allegations that defendant had three prior strike felony convictions, the trial court sentenced him to state prison for 33 years to life plus six years.

Defendant appeals, contending the trial court erred in excluding proffered defense evidence and in denying his motion to strike prior serious felony convictions. We shall affirm.

¹ Undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

While attending a barbeque at the home of his brother Rick,² defendant intervened in a fight between Rick and the victim, Paul Prestridge, and stabbed Prestridge to death. The altercation arose from an argument Prestridge got into with defendant and Rick over whether a certain marijuana dealer they all knew was a "chomo," a prison slang term for child molester. The argument escalated to a physical fight. Prestridge began slapping and punching Rick, who tried to shield himself.

As the two men fought, defendant went to the kitchen and grabbed a steak knife. Two guests at the barbeque tried to convince defendant to put it down. One of them, Angela McConley, tried to take the knife away from defendant but defendant pushed past her, cutting her arm in the process. By this time, the fight had moved into the dining room. Rick was on Prestridge's back and had him in a chokehold. Defendant entered the fray and stood over Prestridge, making swinging and punching motions at him. Although none of the witnesses actually saw defendant stab Prestridge, a woman yelled "He's got a knife," and the steak knife defendant had seized was found on the floor immediately after the fight.

As Prestridge got to his feet, defendant returned to the kitchen and grabbed a large butcher knife. When Rick's girlfriend, Amanda Baum, tried to block defendant, he told her

² Because defendant and his brother share the same last name, we refer to his brother as "Rick" to avoid confusion.

to "get the fuck out of his way," so he could "finish this." Baum managed to take the butcher knife away from him. Just then Prestridge moved toward a door, leaned against the jamb, complained he could not breathe, and collapsed. He had been fatally stabbed in the heart.

Defendant was charged in count 1 with the murder of Prestridge (§ 187, subd. (a)) with an allegation he used a dangerous and deadly weapon in commission of the offense. (§ 12022, subd. (b)(1).) In count 2, defendant was charged with assault with a deadly weapon upon Angela McConley. (§ 245, subd. (a)(1).) As to both counts, defendant was alleged to have sustained a prior serious felony conviction (§ 667, subd. (a)(1)), prior prison term (§ 667.5, subd. (b)) and three prior serious felony convictions that qualified as strikes under the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

On the murder charge, the jury found defendant guilty of the lesser included offense of voluntary manslaughter and found he had used a deadly weapon. It acquitted him of the remaining charges. After the jury verdict, the court found true the felony enhancements and strike allegations. Defendant was sentenced to an indeterminate term of 33 years to life plus six years for the enhancements.

DISCUSSION

I. Exclusion of Rick's Out-of-court Statement

Defense counsel called defendant's brother Rick as a witness, but Rick refused to testify, invoking his Fifth Amendment privilege against self-incrimination. When the prosecutor and Rick's attorney could not reach agreement on terms of immunity if Rick testified, defense counsel argued that Rick was legally unavailable as a witness and sought to introduce his out-of-court statement, made to a defense investigator, as a declaration against penal interest. (Evid. Code, § 1230.) The statement was made in response to the investigator's question whether he (Rick) may have grabbed the knife and swung it at Prestridge to defend himself. Rick's response was, "I may have. I don't know. I don't think so, but it's possible."

The trial court excluded the statement. It found that while Rick was unavailable to testify, his declaration was neither against his penal interest nor reliable. The court noted that Rick's declaration was "at most speculative, it's ambiguous, and, if anything, would point to some exculpatory comments" rather than the type of statement that would inculcate Rick in a criminal act. The court also ruled that given Rick's relationship to defendant, the statement lacked reliability.

Defendant now contends (1) the trial court erroneously excluded Rick's statement; (2) the exclusion violated his constitutional rights; and (3) trial counsel was ineffective for

not objecting to the court's ruling on constitutional grounds. We disagree on all points.

Hearsay is not generally admissible as evidence. (Evid. Code, § 1200, subd. (b).) One exception to this rule is that an out-of-court statement against penal interest may be admitted if the hearsay declarant is unavailable to testify in court. (Evid. Code, § 1230). To qualify for admissibility, the proponent of the declaration must show that (1) the declarant is unavailable, (2) the declaration was against the declarant's penal interest, and (3) the declaration was sufficiently reliable to warrant admission. (*People v. Lawley* (2002) 27 Cal.4th 102, 153; *People v. Cudjo* (1993) 6 Cal.4th 585, 607.) We review the court's ruling on this issue for abuse of discretion. (*Lawley*, at pp. 153-154; *Cudjo*, at p. 607.)

It is undisputed that Rick was unavailable. We therefore examine whether the trial court abused its discretion in finding the remaining two requirements for admissibility were not satisfied.

A declaration against penal interest is one that is "specifically dis-serving to the interests of the declarant" (*People v. Leach* (1975) 15 Cal.3d 419, 441), and "so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true" (Evid. Code, § 1230). Rick's statement was equivocal at best--he said that he "may have" swung the knife at Prestridge but was unsure, and

did not think he had. Moreover, the statement was made in response to a leading question: Whether Rick swung the knife *in self-defense*. Had he acted in self-defense, Rick would not have been subjected to *any* criminal liability. Thus, the statement was not "specifically dis-serving" to the declarant's penal interest. (*People v. Duarte* (2000) 24 Cal.4th 603, 612.)

We also uphold the trial court's determination that Rick's statement was untrustworthy. In determining whether a declaration is sufficiently trustworthy to be admissible, a trial court must consider the totality of the circumstances in which it was made, including the words stated, whether the declarant spoke from personal knowledge, the declarant's possible motivation and relationship to the defendant, and other circumstances under which the words were stated. (*People v. Geier* (2007) 41 Cal.4th 555, 584; *People v. Frierson* (1991) 53 Cal.3d 730, 745.) The subject statement was ambiguous, not given under oath, and made under circumstances strongly suggesting that Rick was motivated to exonerate his brother, while limiting his own criminal exposure. No error appears.

Defendant's independent claim that exclusion of the evidence violated his constitutional rights is also unpersuasive. The court correctly applied the rules of evidence and the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.) Likewise, defense counsel cannot be charged with

incompetence for failing to raise a constitutional objection, since no grounds for a meritorious objection existed. (See *People v. Anderson* (2001) 25 Cal.4th 543, 587 ["Counsel is not required to proffer futile objections"].)

II. Exclusion of Evidence of Prestridge's Tattoo and Gang Affiliation

Out of the presence of the jury, defense counsel made a motion to call Special Agent Matthew Buechner of the Department of Corrections and Rehabilitation as an expert witness on prison culture. According to the offer of proof, Agent Buechner would explain that "chomo" is a serious insult in prison culture because it means "child molester"; that child molesters and their associates are particularly despised by prisoners; and that "chomos" are often subject to beatings or stabbings.

Defense counsel also sought to have Agent Buechner testify that Prestridge wore a tattoo indicative of membership in the Butte County Gangsters. According to this second offer of proof, Buechner would testify that the tattoo indicated Prestridge's affiliation with the Aryan Brotherhood prison gang, who are known to attack child molesters and their associates. The testimony was assertedly relevant to explain Prestridge's motivation for attacking Rick and to show defendant had reason to fear Prestridge was going to inflict substantial injury on his brother.

The trial court concluded that evidence regarding the term "chomo" and the gang tattoo evidence were separate issues. It allowed Agent Buechner to testify about the meaning of the word

"chomo" and its link to prison culture, since "chomo" was a term with which the jury might not be familiar. However, the court tentatively excluded the gang tattoo evidence as irrelevant. The court stated: "[I]f the evidence were to show that [defendant] had actual fear that his brother was in imminent danger of death or great bodily injury, [the gang] evidence might be admissible to show what was in [defendant's] mind, because the jury is entitled to know why he did what he did. But at this point in the trial there is no evidence to support what was in [defendant's] mind. None whatsoever. And so for that reason, *at this point in the trial* it would be inadmissible. [¶] Now, *if at some point in the trial, however, it gets into evidence*, the jury is told that [defendant] *had fear*, and that's the key word, of his brother's life being taken and for that reason he was authorized to . . . inject deadly force into that wrestling match, then corroboration of his state of mind would be relevant. But we're getting the cart before the horse." (Italics added.)

Defendant now contends the trial court erred in preventing Agent Buechner from testifying about Prestridge's tattoo and its meaning. The claim is forfeited because the ruling that defendant challenges was not a final one. The court characterized the motion as premature, but it clearly left open the possibility the evidence might later be admissible, depending upon what evidence the defense submitted. However, counsel never renewed his motion or asked for a final ruling.

He simply let the matter drop.³ Because defendant never obtained a definitive ruling on his motion, the point has been deemed abandoned. (See, e.g., *People v. Bolin* (1998) 18 Cal.4th 297, 312-313; *People v. Vera* (2004) 122 Cal.App.4th 970, 981-982.)

Even if the issue had been properly preserved, the ruling caused defendant no prejudice. (See Evid. Code, 354; *People v. Whitson* (1998) 17 Cal.4th 229, 251; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Defendant brought a knife to a fistfight and stabbed to death a man who was already being held in a chokehold. The jury received instructions on heat of passion and imperfect defense of another as mitigating circumstances. Because it returned a verdict of voluntary manslaughter, the jurors must have found one of these doctrines to be applicable. Inasmuch as Prestridge had no weapon and defendant's brother already had Prestridge in a headlock when defendant intervened, the use of a steak knife, even under a good faith belief in the need to defend another, was a patently *unreasonable* use of deadly force. No reasonable jury could have acquitted defendant of all charges under these circumstances. The voluntary

³ While the record does not indicate why defense counsel did not pursue the motion to admit Agent Buechner's testimony regarding the gang tattoo, counsel could easily have decided that introducing this evidence might do more harm than good to his client. Counsel was aware that Buechner's testimony about the meaning of "chomo" would alert the jury that defendant had been in prison. Evidence suggesting defendant also understood the gang symbolism of the tattoo could easily have led the jurors to suspect defendant himself had some involvement with prison gangs, perhaps one that was a rival to Prestridge's.

manslaughter verdict was the best one defendant could have hoped for under the state of the evidence. There was no probability of a more favorable result had the jury heard about the significance of the gang tattoo.

III. *Romero* Motion

The trial court found true that defendant had three serious felony convictions within the meaning of the three strikes law: for robbery, rape in concert, and burglary.

Defendant filed a *Romero* motion, requesting the court strike one or more of his prior felony convictions. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) At the hearing, counsel asserted that all three prior convictions arose out of the "same course of conduct." The court refused to strike any of the priors, "based on the nature of the crime, the fact that an individual was unlawfully killed, based on the fact that [defendant] was on parole at the time he committed that crime, and based on the fact that the three prior convictions were particularly serious." In denying a subsequent motion for reconsideration, the court reaffirmed its ruling, stating, "this is a case that falls within the spirit of the three strikes law."

Defendant contends that the trial court abused its discretion when it denied his *Romero* motion. He bases this claim on the factual assertion that all three felonies were the product of a single act. He cites dictum in *People v. Benson* (1998) 18 Cal.4th 24 (*Benson*), wherein the California Supreme

Court suggested there might be some circumstances "in which two prior felony convictions are so closely connected--for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct--" in which the trial court's failure to strike a strike might be an abuse of discretion. (*Benson*, at p. 36, fn. 8.)

Defendant shows either ambivalence or confusion about the factual predicate of his argument. In the argument heading of his opening brief, he claims that all three felonies were based on a "single act." In the body of his argument, however, defendant asserts merely that they were "based upon a single incident." Defendant repeats these inconsistent characterizations in his reply brief. Either way, his argument fails.

If the claim is that all three convictions were based on a *single act*, the assertion fails for lack of evidentiary support. The probation report indicates that the three prior offenses were all *committed on the same day*, September 18, 1989, and the abstract of judgment indicates that defendant was *sentenced* for all three on the same date. However, nothing in the record indicates whether the convictions were the result of multiple acts or even multiple incidents. As we said in *People v. Scott* (2009) 179 Cal.App.4th 920 (*Scott*) "[T]o the extent defendant wanted to show that his . . . strikes arose from the same act, he had the burden to provide *evidence* of that fact." (*Id.* at

p. 925, fn. 2.) Since defendant did not provide evidentiary support for his assertion that the priors “arose out of a single act” and all ambiguities in the record must be construed *against* him (*ibid.*), the claim fails at the inception.⁴

If defendant contends that all three strikes arose from a *single course of conduct*, his claim must be rejected for failure to cite relevant case law. The *Benson* hypothetical, by its own terms, is limited to cases in which all prior strikes arose from a *single act*, not where they were the product of an indivisible course of conduct. (*Benson, supra*, 18 Cal.4th at p. 36, fn. 8.)

Significantly, defendant makes no attempt to demonstrate that he falls outside the spirit of the three strikes law. (See *People v. Carmony* (2004) 33 Cal.4th 367, 378.) Thus, we uphold the trial court’s refusal to dismiss any of the strikes.

IV. Section 4019

The recent amendments to section 4019 do not entitle defendant to additional time credits, as he was committed in this case for a “serious” felony. (§ 4019, subds. (b)(2) & (c)(2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) The voluntary manslaughter conviction, along with the special finding that

⁴ As we held in *Scott*, even if the record showed that all the prior serious felonies arose from a single act, that *still* would not require the trial court to strike any of them in the interest of justice. Evidence that multiple strikes arose from a “single act” constitutes but one factor that should be taken into account by the trial court in exercising its discretion on a *Romero* motion. (*Scott, supra*, 179 Cal.App.4th at pp. 923, 931.)

defendant used a deadly weapon in the commission of the offense, preclude additional conduct credits. (§ 1192.7, subds. (c)(1), (23).) Defendant's three prior serious felony convictions that qualified as strikes also preclude the award of additional credits. (§ 4019, subds. (b)(2) & (c)(2).)

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

SIMS, Acting P. J.

HULL, J.